IN THE

Supreme Court of the United States

October Term, 1963

No. 1027

UNITED STATES OF AMERICA,

Petitioner,

v.

COMMUNIST PARTY OF THE UNITED STATES,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

Questions Presented

The following questions are presented by the disposition of the case in the court below:

1. Whether respondent's officers could rightfully refuse, on the ground of their privilege against self-incrimination, to execute under their names and titles and file with the Attorney General forms registering respondent under section 7 of the Subversive Activities Control Act (hereinafter called the Act).

2. Whether, in a prosecution of respondent for willful failure to comply with the registration order of the Subversive Activities Control Board (hereinafter called the Board), the burden is upon the government to prove (a) that an officer of respondent was willing to forego his constitutional privilege by authorizing a third person to execute and file the registration documents for respondent and (b) that some third person, if so authorized, would have been willing to execute and file such documents for respondent.

The following questions were raised in, but not reached by, the court below. If certiorari is granted they will be briefed by respondent as additional grounds to support the judgment reversing respondent's conviction:

3. Whether respondent can constitutionally be convicted for its failure to file a registration form which requires it to describe itself as a Communist-action organization.

4. Whether respondent, not having registered under section 7(a) of the Act, was required to file a registration statement pursuant to section 7(d).

5. Whether the jury should have been instructed that respondent could not be convicted unless the failure to comply with the Board's registration order was actuated by an evil purpose and was without a justifiable excuse.

6. Whether sections 7 and 15 of the Act unconstitutionally denied respondent a judicial and jury trial on the issue of whether it is a Communist-action organization.

7. Whether the requirement that respondent file a registration statement under section 7(d) of the Act is unconstitutional because the statement makes demands which are excessively vague and calls for information which respondent cannot obtain.

8. Whether the trial court denied an adequate voir dire examination of the prospective jurors.

9. Whether the indictment should have been dismissed because of the presence of government employees on the grand jury or, in the alternative, whether the trial court should have conducted a hearing on the qualifications of the grand jurors.

10. Whether the cumulative sentences imposed by the trial court violate the Eighth Amendment's prohibition of excessive fines and due process.

Statement

The Act provides that an organization which is required to register as a Communist-action organization shall do so on a form prescribed by the Attorney General and that its registration shall be accompanied by a registration statement prepared and filed in such manner and form as the Attorney General shall prescribe (sec. 7(a) and (d)). Amended regulations of the Attorney General effective October 7, 1961, prescribe that registration shall be accomplished by the filing with him of a form, IS-51a, designated as a "registration form" (J.A. 56-58). This form, which calls for no information except the name and address of the registrant, requires a declaration that the registrant "hereby registers as a Communist-action organization." The amended regulations also require the filing of a second form, IS-51, designated as a "registration statement" (J.A. 58-63) which again calls for the registrant's name and address, as well as for the names of its officers and members and the information concerning its finances and printing equipment specified in section 7(d).

The two forms may be executed in either one of two ways. They may be signed on behalf of the registrant by one of its officers who subscribes his title. Or they may be signed by any person who states his address and who certifies, on the registration form that he has been authorized by the registrant to register it, and on the registration statement that he has been authorized by the registrant to file the statement. (J.A. 57-59, 63).[1]

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[1] The amended regulations and forms superseded the regulations and form described in *Communist Party* v. *Subversive Activities Control Board*, 367 U. S. 1, 105 (herein called the *Party* case). Under the prior regulations, registration and the registration statement were combined in a single form which required the signatures of all of the registrant's officers and which made no provision for an alternative mode of execution.

The deadline for the registration of respondent under the Act was November 19, 1961.[2] On November 10, 1961, respondent mailed a letter to the Assistant Attorney General, Internal Security Division, Department of Justice,[3] which was received in the Department the following day and by the Internal Security Division on November 13. The letter was on respondent's letterhead, carrying its name and address, and bore the typewritten subscription, "Communist Party of the United States by its authorized officers" and respondent's seal. The letter stated that each of respondent's officers declined to sign or file, or to authorize the signing or filing of, forms 18-51 and 18-51a in the exercise of his Fifth Amendment privilege not to be a witness against himself. The letter further stated that the officers had adopted this means of asserting the privilege because a claim of privilege made in the name of an officer would tend to incriminate him and might constitute a waiver of his privilege. In addition, the letter stated it to be the conviction of respondent and its officers that respondent is not a Communist action organization. (J.A. 70-71.)

On November 17, 1961, the Assistant Attorney General, Internal Security Division, sent respondent a telegram, received the same day, denying the claims of privilege made in respondent's letter and rejecting the letter as full or partial compliance with the registration requirements of the Act. (J.A. 70, 72).

The indictment of respondent followed on December 1, 1961.

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[2] Section 7(a) requires an organization to register within 30 days after an order requiring it to do so becomes final. A registration order becomes final 10 days after the issuance of the Court's mandate upon affirmance of the order. (Sec. 13(b).) The mandate in the *Party* case issued October 10, 1961, following denial of a rehearing. See 368 U.S. 871.

[3] Section 11.10(b) of the regulations requires communications respecting registration to be addressed to him.

Argument

The decision below does not foreclose the conviction of respondent for failure to register under the Act, but gives the government the option of a new trial (Pet. 31-32). Nevertheless, the petition complains (p. 6) that the decision "interferes with the operation" of the Act by the ruling that the prosecution has the burden of proving the existence of a person who was willing to sign and submit the registration documents (forms 18-51 and 18-53a) on respondent's behalf. But the government does not assert that the proof required of it by the court below is unavailable. Nor is there any showing that compliance with the requirement would be unduly burdensome. Thus the government's complaint rests on nothing but its *ipse dixit*.

The government also complains (Pet. 7) that enforcement proceedings against respondent have been pending for fourteen years and that, by requiring a new trial, "the decision below will delay the application of the Act to the Communist Party for several additional years." The prior delay resulted from Board errors that twice required remanding the proceedings to it. *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115; *Communist Party* v. *Subversive Activities Control Board*, 254 F. 2d 314. If, as the court below unanimously held, the government is once more in error, a grant of certiorari will simply prolong the delay which the error has already occasioned.

Moreover, the decision below is clearly in accord with the decision in the *Party* case and other relevant decisions of this Court, and a reversal of the conviction was also required on grounds which were briefed but not reached below.

The decision below rests on two holdings, one for each of the alternative methods by which registration documents can be executed under the regulations of the Attorney General. We will show that both holdings are clearly right.

1. Self-incrimination of respondent's officers under the first method of executing the registration documents.

The court below held that respondent's officers were entitled to the privilege, which they had claimed under the Fifth Amendment, not to sign the registration documents as officers, in accordance with the first method prescribed by the regulations. The government disputes the correctness of this holding. It does not, however, dispute the ruling below (Pet. 27-28) that, "Since the officers could not identify themselves in claiming the privilege without surrendering its protection * * * the November 10 letter was a sufficient assertion of their claim." Nor does the government dispute the further ruling below (Pet. 28) that if respondent's officers were privileged not to sign the registration documents "no liability attached to the Party by reason of their refusal."

Clearly, any officer of respondent who executed the registration documents as an officer would incriminate himself in two ways. First, by signing his name and stating his title, he would disclose that he is an officer of the Communist Party, thereby admitting an incriminating fact. *Blau v. United States*, 340 U. S. 159; *Scales v. United States*, 367 U. S. 203.

Second, the officer would incriminate himself by supplying the information called for by the registration documents. The registration statement requires the names and addresses of respondent's officers, members and contributors, the amount and purposes of its expenditures, and the number and location of its printing and duplicating equipment (J.A. 60-63). Each of these items could provide the Attorney General with evidence or leads for a prosecution of the officer under section 4(a) of the Act for conspiring "to perform any act which would substantially contribute to the establishment within the United States of a totali-

tarian dictatorship" under foreign control. It could also supply evidence for use in a prosecution of the officer under the advocacy, organizing, literature, membership and conspiracy clauses of the Smith Act. *Dennis* v. *United States*, 341 U. S. 494; *Scales* v. *United States*, *supra*.

The registration form requires an admission that respondent is a Communist-action organization (J.A. 57) which, by definition, is a participant in a Soviet-controlled conspiracy forcibly to supplant our government with a "Communist totalitarian dictatorship" subservient to the Soviet Union. Act, secs. 3(3) and 2; *Party* case, *supra*, at 55. An admission by an officer that his organization has these characteristics obviously incriminates him under section 4(a) and the Smith Act.

Accordingly, an officer cannot supply any of the information called for by the registration documents without incriminating himself.[9] Cf. *Hoffman* v. *United States*, 341 U. S. 479, 488.

Nevertheless, the government contends that the officers were not entitled to the privilege on two grounds.

(a) It is first argued that an officer of an organization, by accepting office, relinquishes his privilege with respect to any governmental inquiry into the affairs of the organization (Pet. 12). This argument is an extravagant extension of the doctrine of *United States* v. *White*, 322 U. S. 694, that a custodian of organization records is not privileged to withhold *the records* because their *contents* might incriminate him. The registration documents, however, do not require the production of organization records. What they require is (1) that the officer make the incriminating admission of his officership, and (2) that he compile and supply incriminating information which may

[9] The only other information called for by the registration documents—respondent's name and address—was supplied by respondent, no doubt superfluously, in its letter of November 10, 1961 to the Assistant Attorney General (J.A. 70).

not, and probably does not, even appear in the organization's records.

The government's argument was made in the *Party* case. Brief for Respondent, No. 12, Oct. Term, 1960, pp. 121-125. The four Justices who reached the issue rejected the government's contention, holding that the Act's registration requirement violates the privilege of respondent's officers and is therefore invalid. Although the majority held the privilege issue premature, it is evident that they thought the *White* doctrine inapplicable. Otherwise they would have held that the officers had no privilege to claim instead of postponing decision until after the claim of a privilege which the Justices believed non-existent.

Curcio v. United States, 354 U. S. 118, holding that an officer of an organization is privileged not to reveal the whereabouts of organization records, is dispositive of the government's contention. *Curcio* concluded (at 123-25):

> "A custodian, by assuming the duties of his office, undertakes the obligation to produce the books of which he is custodian in response to a rightful exercise of the state's visitorial powers. But he cannot lawfully be compelled, in the absence of adequate immunity from prosecution, to condemn himself by his own oral testimony * * * By accepting custodianship of records he 'has voluntarily assumed a duty which overrides his claim of privilege' *only* with respect to the production of the records themselves." (Emphasis in the original.)

Similarly, *Blau*, *supra*, at. 160, n. 1, held that a grand jury witness was privileged to refuse to answer whether she was in the employ of the Communist Party, was the custodian of its books or knew their whereabouts, knew the names of its officers, or could describe the books.

As already shown, the registration requirements of the Act, like the questions in *Curcio* and *Blau*, do not involve

"production of the records themselves," but compel the officer to "condemn himself" by the equivalent of "his own oral testimony."

(b) It is argued that the privilege is not available to respondent's officers because the government surely knows or suspects the identity of at least one of them (Pet. 13). This hypothetical officer, it is said, will not be prejudiced by divulging his officership in the registration document because section 4(f) prevents the fact of his registration as an officer from being introduced in evidence against him in a criminal proceeding.

The argument is disposed of by *Counselman* v. *Hitchcock*, 142 U. S. 547, which held that a partial immunity statute like section 4(f) cannot over-ride a claim of privilege because the statute does not "afford absolute immunity against future prosecution for the offense to which the question relates" (at 586). It is frivolous to assert that this rule does not apply when the government already has knowledge of, or a lead to, the incriminating fact. How is a person to know when he may rightfully claim his privilege, if the right depends on facts outside his knowledge—*i.e.*, what the government knows or suspects about him? And in fact the Court has applied the *Counselman* rule so as to vindicate claims of privilege, despite statutes of the 4(f) type, where the government already possessed the incriminating information which it sought to elicit from the witness. See, *e. g.*, *Emspak* v. *United States*, 349 U. S. 190, 200.

Moreover, if the *Counselman* rule were subject to the exception urged by the government, it would have been up to the government to prove that this case fell within the exception by evidence that it knew, or had a lead to, the identity of respondent's officers. No such evidence was offered. The rhetorical statement (Pet. 13) that "it is incredible to suppose that there is not at least one officer of the Communist Party who is known to the government", is hardly an acceptable substitute.

Finally, the government's argument relates only to an officer's admission of his officership. Even if the argument were sound, the privilege would still protect the officers against making the incriminating admission required by form IS-51a that respondent is a Communist-action organization and from furnishing the incriminating information called for by form IS-51. This is so because section 4(f) merely bars the evidentiary use against an accused of the fact of his registration as an officer or member of respondent. It does not bar the use in evidence against an officer of any of the other contents of the registration documents which he executes.[5] Nor does the government claim that it is already in possession of, or has leads to, the information called for by form IS-51.

(c) Even if it were assumed that respondent's officers were not protected by the privilege in refusing to execute or authorize the execution of the registration documents, the decision below reversing the conviction would still have been required.

The indictment charges respondent with "wilfully and unlawfully" failing to register and file a registration statement (J.A. 2-7); the court below ruled that "wilfulness is a necessary element of the crime of failing to register" (Pet. 31, n. 16); and the government does not dispute this ruling.[6] In determining whether or not the failure of respondent, an association, was willful, it is the mental state of its officers that must be imputed to it. *United States* v. *A. P. Trucking Co.*, 358 U. S. 121, 125; *New York Central* v. *United States*, 212 U. S. 481. In view of the dissents in the *Barta* case and the decision below, it cannot be denied that the officers had at least colorable grounds for believ-

[5] The section provides: "The fact of the registration of any person under section 7 or section 8 of this title as an officer or member of any Communist organization shall not be received in evidence against such person in any prosecution * * *."

ing that the privilege which they claimed was available to them. Therefore, their refusal to execute the registration documents on the basis of their claim of privilege was not willful.[9] This conclusion is established by *United States* v. *Murdock*, 290 U. S. 389, holding that the refusal of an accused to supply information demanded by the government is not willful when made in mistaken reliance on the privilege against self-incrimination.

2. The burden of proof concerning respondent's ability to register by the alternative method.

The alternative method of executing the registration documents permits them to be signed by a person other than an officer who shows his address and certifies that he has been authorized by respondent to act for it (J.A. 58, 63). The government complains (Pet. 14-17) of the ruling below that the prosecution had the burden of proving the availability of such a "willing volunteer" to execute the registration documents.

The ruling was required, in the first place, by the fact that, as the government does not dispute, willfulness is an element of the offense of failure to register (see *supra*, p. 10), and the principle that the prosecution has the burden of proving *mens rea*, like every other element of an offense, on its affirmative case. *Heikkinen* v. *United States*, 355 U. S. 273, 276; *Quinn* v. *United States*, 349 U. S. 155, 165; *Holland* v. *United States*, 348 U. S. 121, 139; *Morissette* v. *United States*, 342 U. S. 246, 273-276.

On this point, *Heikkinen* is controlling. It involved a charge that the accused, a deportee, had willfully failed to depart the United States. The Court held that the govern-

[9] At a minimum, the issue of respondent's willfulness, in the sense of evil purpose and lack of justifiable excuse, should have been submitted to the jury. The failure of the trial judge to do so would itself have required a reversal of the conviction. See *supra*, pp. 15-16.

ment had the burden of proving that some other country was willing to receive the accused and, hence, that he could have departed as the statute required. The Court said (at 276, emphasis in the original):

> "This is a criminal case. It is therefore necessary that the prosecution adduce evidence sufficient to support a finding of guilt beyond a reasonable doubt * * *. The crucial element of the crime charged in the first count is that petitioner 'did *willfully* fail to depart from the United States' within six months from the deportation order * * *. A thorough review of the record discloses no evidence that any country was willing, in that period, to receive petitioner * * *. The evidence on Count 1 is thus insufficient to support the verdict * * *."

Heikkinen thus establishes that where performance of a statutory duty by an accused requires the cooperation of some other person or agency, the government has the burden of proving that the other person or agency was willing to cooperate before the accused can be convicted of a willful default. There, since respondent's registration required the cooperation of a "willing volunteer," the burden was on the government to prove that there was such a person.

The cases cited by the government (Pet. 14) for what it calls "the ordinary rule" (Pet. 16) are inapplicable, if only for the reason that none of them involved an offense in which willfulness is an element.[3]

Moreover, the government had the burden of proof because the "other person" method of executing the registration documents is, prima facie, an illusory alternative. In the first place, it requires at least one of respondent's

[3] *United States* v. *One "Stuttz" Bottle*, 205 F. 2d 332, and *United States* v. *12 Jars*, 102 F. Supp. 344 were forfeiture proceedings under the Food, Drug and Cosmetics Act, for which *mens rea* is required; *Simon* v. *American Tobacco Corp.*, 192 Fed. 662 involved the verification of the answer of a corporate defendant in a civil suit.

officers to relinquish the privilege which he claimed and to incriminate himself. This follows from the fact that the "other person" must certify on the registration documents that he is authorized to act for respondent. Since only respondent's officers can grant this authority, the alternative method requires at least one officer to disclose the incriminating fact of his officership to the "other person."[8] The fact that this method compels the officer to make the incriminating admission to a third person, instead of directly to the Attorney General, is irrelevant. The Fifth Amendment prohibits the government from compelling a person to make an incriminating admission to *anyone*. Moreover, the third person may communicate the incriminating information to the government, either voluntarily or under compulsion of subpoena. In addition, the alternative method requires respondent's officers to supply the information called for by the registration documents for submission to the Attorney General, and thereby to incriminate themselves. See *supra*, pp. 6-7.

Second, the alternative method of registration assumes the possibility of finding a volunteer who is willing (1) to risk self-incrimination by evidencing at least sufficient knowledge of respondent's inner workings to be able to certify that he has been duly authorized to act on its behalf; (2) to incur possible criminal liability under section 15(b) of the Act for complicity in any false statements in and omissions from the registration documents; (3) to file with the Attorney General documents whose contents can be used in evidence against him in a prosecution under the Smith Act or section 4(a), and (4) to incur both the notoriety of a public identification as the agent of respondent and the odium of informing on its members, contributors and officers.

[8] The officer is required to incriminate himself not merely to a single person but to others whom he approaches and who decline to act.

Since persons can appear as spokesmen for respondent before college audiences without incurring these consequences, the government's appeal to "common knowledge" that respondent solicits such appearances (Pet. 15-16) is irrelevant. It is even more farfetched to argue (Pet. 16) that because some lawyers are willing to defend the constitutional rights of respondent in the courts, they will also be willing to undertake the non-professional function of executing the registration documents as its agent.

An additional reason why the burden of proof cannot be placed on respondent is that, as pointed out by the court below (Pet. 39), "It is unlikely that the Party could make this proof unless someone waived his privilege and testified to his efforts on behalf of the Party in seeking a signer." The same difficulty is inherent in the government's suggestion (Pet. 16, n. 9) that respondent could produce "as witnesses persons who had refused to act for it." For each such witness would, of course, have to identify the officer who had requested him to act for respondent.

3. Grounds not reached by the court below which support its judgment.

In the court below, respondent presented seven additional grounds for reversing the conviction and one ground for vacating the sentence. None of these was reached by the court. We append a brief statement of each.

(a) Eleven counts of the indictment charge failure to file the registration form (IS-51A) which called only for respondent's name and address and the statement that it "hereby registers as a Communist-action organization." (J.A. 1-7, 57). Since respondent had supplied its name and address in the letter of November 10, 1961, to the Department of Justice (J.A. 70), its conviction on these counts was based on nothing but its refusal to characterize itself as a Communist-action organization. It has contested the validity of this characterization throughout four-

teen years of litigation, and reiterated its position in the November 10 letter. No conceivable governmental interest is served by forcing respondent to declare that the Board's finding is accurate, and to do so invades its freedom of belief. Accordingly, conviction on the first eleven counts of the indictment violates the First Amendment and due process. *West Virginia Board of Ed.* v. *Barnette*, 319 U. S. 624; *Ark-Metals Construction Co.* v. *N.L.R.B.*, 110 F. 2d 148; *Hartsell Mills Co.* v. *N.L.R.B.*, 111 F. 2d 291; *Kansas City P. & L. Co.* v. *N.L.R.B.*, 111 F. 2d 340; *Swift & Co.* v. *N.L.R.B.*, 106 F. 2d 87; *N.L.R.B.* v. *Louisville Refining Co.*, 102 F. 2d 678.

(b) Respondent's conviction on count XII of the indictment was erroneous because an organization which has not registered pursuant to section 7(a) is not required to file a registration statement pursuant to section 7(d). This interpretation of the Act follows from the provision of section 7(d) that a registration under 7(a) "shall be *accompanied* by a registration statement" and from the fact that the correlative annual reporting and record-keeping requirements of 7(e) and (f) are likewise applicable only to organizations "registered under this section." At a minimum, this interpretation of section 7(d) is as plausible as the contrary, and is therefore demanded by the principle of strict construction of penal statutes. Since, as the indictment alleges (J.A. 2), respondent did not register under 7(a), a reversal of its conviction for violating 7(d) was required.

(c) The trial judge refused to charge that the term wilfully, as used in the indictment, denotes the presence of an evil purpose and the lack of a justifiable excuse (*Screws* v. *United States*, 325 U. S. 91, 101; *Heikkinen* v. *United States*, 355 U. S. 273, 279), or that respondent was not guilty if its officers believed in good faith that they had a constitutional privilege not to register and file the registration statement (J.A. 73-75). Instead, he instructed the

jury that it could return a guilty verdict if it found that respondent's failure to file the registration documents was intentional and deliberate (J.A. 42-43). The charge and refusals to charge were erroneous and require a reversal of the conviction.

(d) Sections 7 and 15 of the Act made the Board's finding that respondent is a Communist-action organization conclusive in the criminal prosecution for its failure to register and file a registration statement. As the trial court instructed the jury, the Board's determination "is binding on you and me" (J.A. 44). Thus the Act subjects respondent to punishment for failing to perform the registration obligations of a Communist-action organization, while denying it a judicial and jury trial on the issue as to whether it is such an organization.

The Act and respondent's conviction therefore violate art. III, sec. 2, cl. 3 of the Constitution and the Sixth Amendment, requiring the trial of crimes by jury, due process of law, art. III, sec. 1, vesting the judicial power in the courts, and art. 1, sec. 9, cl. 3 prohibiting bills of attainder. *United States* v. *Spector*, 343 U. S. 169, 174 *et seq.* (dissenting opinion)[9]; *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144; *Wong Wing* v. *United States*, 163 U. S. 228; Frankel, *Can the Administrative Process Evade the Sixth Amendment?* 1 Syracuse L. Rev. 173. The Act's invalidity is the more egregious because the sole constitutional justification for the registration requirements is that their application is limited to organizations having the characteristics of a Communist-action organization. See *Party* case at 88-92.

(e) Section 7(d) and the registration statement (form IS-51) violate due process because they are vague and demand information that respondent does not have the

[9] The majority did not consider this question because it had not been presented.

power to supply. Thus, form IS-51 calls for the names and aliases of respondent's members (J.A. 61-62). Determination of the identity of the members must be made in accordance with section 5 of the Communist Control Act, 50 U. S. C. 844, and *Killian* v. *United States*, 368 U. S. 231. As will appear from inspection, these criteria are not only extremely vague but turn on activities and mental attitudes which cannot possibly be known to respondent. Again, form IS-51 (J.A. 62) calls for detailed information concerning printing and duplicating devices "in the possession, custody, ownership or control" of respondent's "members, affiliates, associates or any other group or groups in which" respondent's "members have an interest." It would obviously be impossible for respondent to identify the persons and groups included in this vague and embracing description, let alone to ascertain the printing and duplicating devices in the possession of each.

Since two of the key demands of the registration statement are invalid, respondent cannot be punished for noncompliance with the remaining demands. *Boumgarn Dairy Co.* v. *United States*, 341 U. S. 214, 221; *St. Regis Paper Co.* v. *United States*, 368 U. S. 208, 224.

(f) The trial court denied an adequate *voir dire* examination of prospective jurors. It erroneously rejected questions designed to ascertain if the jurors were prejudiced against respondent or had formed any opinion as to guilt or innocence, thereby precluding determination of conventional causes for disqualification of jurors. It also erroneously rejected other questions seeking to explore the existence of experience and connections which could reasonably be expected to influence the jurors' ability to render an impartial verdict. (J.A. 21-27.) These rulings interfered with respondent's constitutional right to an impartial jury. *Morford* v. *United States*, 339 U. S. 258; *Aldridge* v. *United States*, 283 U. S. 308; *United States* v. *Burr*, Fed. Cas. No. 14,692g, p. 50; *Dennis* v. *United States*, 339 U. S. 162, 171-72; *Reynolds* v. *United States*, 8 Otto 145, 155.

(g) Respondent moved to dismiss the indictment because of the presence on the grand jury of thirteen government employees, some in sensitive agencies, and two retired government employees. Respondent also moved for a hearing on the qualifications of the grand jurors. It filed a supporting affidavit and an offer of proof stating, in substance, that because of the government's official policy of antagonism to Communism and the Communist Party and the conditioning of federal employees, the latter, as a class, have been psychologically disabled from disagreeing with the prosecutor's accusations of respondent. The District Court denied the motions. (J.A. 8-17.) The denial of the motions violated the Fifth Amendment requirement of "a legally constituted and unbiased grand jury." See *Costello* v. *United States*, 350 U. S. 359, 363; *Lawn* v. *United States*, 355 U. S. 339, 349.

(h) The sentence imposing the maximum statutory penalty of $10,000 on each count (J.A. 76) violates the prohibition of the Eighth Amendment against the imposition of "excessive fines." This is true, first, because counts I through XI charge what realistically is but one offense—resistance to registering. Cf. the statement of Justice Field, dissenting, in *O'Neil* v. *Vermont*, 144 U. S. 323, 340, endorsed in *Weems* v. *United States*, 217 U. S. 349, 371. Second, this is a test case which respondent could precipitate only by violating the Act after a vain attempt to secure an adjudication of the privilege issue in the *Party* case. Under these circumstances, imposition of the daily cumulative penalty violates due process as well as the Eighth Amendment. Cf. *Ex Parte Young*, 209 U. S. 123; *Gulf, C. & S. F. Co.* v. *Texas*, 246 U. S. 58, 62.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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